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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Consider the
Adoption of a General Order and Procedures
to Implement the Digital Infrastructure and
Video Competition Act of 2006.

R.06-10-005

**OPENING COMMENTS
OF SUREWEST TELEVIDEO (U 6324 C)
ON PROPOSED DECISION MAILED JANUARY 16, 2007**

E. Garth Black
Mark P. Schreiber
Sean P. Beatty
Patrick M. Rosvall
COOPER, WHITE & COOPER LLP
201 California Street, 17th Floor
San Francisco, California 94111
Telephone: (415) 433-1900
Facsimile: (415) 433-5530

Attorneys for SureWest TeleVideo

February 5, 2007

1 **I. INTRODUCTION.**

2 Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, SureWest
3 TeleVideo ("SWT") files these opening comments on the proposed decision ("PD") addressing
4 implementation of the statutory provisions of the Digital Infrastructure and Video Competition
5 Act of 2006 ("DIVCA").

6 SWT commends the Commission, its staff and the ALJ for their hard work in putting
7 together a detailed set of rules implementing a complex statutory framework in such a short period
8 of time. Most importantly, the PD appropriately recognizes the limited role the California
9 Legislature intended for the Commission's regulation of video service providers. The PD's
10 commitment to "create a regulatory regime consistent with and supportive of the Legislature's
11 stated objectives" establishes the guiding principle against which each of the PD's proposed rules
12 must be measured.

13 Although SWT generally supports the PD, there are several areas in which the
14 Commission should make some adjustments. First, SWT is concerned that the PD's broadband
15 reporting requirements create disparate obligations among broadband competitors and will not
16 lead to a comprehensive picture of broadband deployment in California. Second, the Commission
17 should ensure that its collection of user fees in the first year of state-issued franchises does not
18 become a barrier to entry. Third, the Commission should refine its definition of "Telephone
19 Service Area," a definition which impacts reporting requirements. Fourth, the Commission should
20 track more closely DIVCA's intent regarding build-out requirements applied to small video service
21 providers. Finally, the PD should incorporate the different standards applied to on-going
22 effectiveness of local franchises for small video service providers.

23
24 **II. THE PD'S BROADBAND REPORTING REQUIREMENTS CREATE DISPARATE**
25 **TREATMENT OF BROADBAND PROVIDERS.**

26 SWT is concerned that it may not have clearly articulated its position regarding reporting
27 requirements, judging from the manner in which SWT's comments were quoted in the PD. In the

1 context of identifying the proper entity to hold a state-issued video franchise, the PD references
2 comments SWT made addressing whether affiliates of franchise holders should be required to
3 report broadband deployment and usage.¹ In that section, the PD quotes SWT's comments as
4 stating that the Commission lacks legal authority to require non-regulated affiliates to report
5 broadband deployment and usage. SWT made those comments to support its position that any
6 rules the Commission adopts should closely track the statutory provisions of AB 2987; because
7 AB 2987 was specifically crafted to enhance video competition, such reporting obligations should
8 only encompass broadband services using video facilities and not extend to other affiliates and
9 non-regulated entities. Accordingly, SWT felt that imposing affiliate reporting requirements
10 exceeded the scope of reporting requirements in DIVCA.

11 On the other hand, SureWest understands and concurs with the PD's concern that a
12 company could structure its broadband affiliate as a separate entity in an attempt to avoid the
13 reporting requirement and that the new general order should prevent companies from using
14 corporate formalities to evade legitimate reporting requirements. Another possible option the
15 Commission should consider that does not stretch reporting requirements beyond what SureWest
16 believes was contemplated in DIVCA could be for the Commission to require affiliates to report
17 all broadband information that utilizes the cable or telephone network. This alternative approach
18 would tailor the reporting rules more closely with the express statutory provisions of DIVCA.

19 Of course, SWT will submit broadband reports as the Commission mandates, including
20 information related to SWT's affiliates if the Commission requires. In fact, SWT's corporate
21 organization and the structure under which it and its affiliates offer broadband services make SWT
22 the entity that provides both cable television and broadband services across its cable television
23 operations. Therefore, no matter how the Commission frames its reporting requirements, SWT
24 will be reporting its broadband customers utilizing SWT's network.

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¹ PD, p. 34.

1 However, SWT notes that the PD creates reporting requirements applicable to the affiliates
2 of franchise holders that do not apply to competitors of those affiliates.² Specifically, broadband
3 service providers that do not have affiliates who possess state-issued video franchises will not be
4 subject to reporting requirements. Despite the PD's stated intent to generate comprehensive,
5 statewide data on broadband usage, its analysis will not include information from a variety of
6 wireless carriers and other entities such as Covad or Earthlink who provide broadband but don't
7 have affiliates that will be subject to the DIVCA reporting requirements. In addition, many cities
8 are establishing their own WiFi networks (e.g. San Francisco) that provide free or low cost
9 broadband access to citizens, and such networks will not be subject to reporting. Absent complete
10 information, the Commission will generate inaccurate reports regarding the full availability of
11 broadband in the state. To remedy this discrepancy, SWT's comments were meant to suggest that
12 the Commission may want to consider pursuing legislation that would give it the authority to
13 require all providers of broadband services to report data to the Commission. This in turn would
14 provide the entire field of broadband availability and provide a level playing field for reporting
15 requirements between all types of broadband providers.

16
17 **III. THE COMMISSION SHOULD NOT PERMIT YEAR ONE USER FEES TO**
18 **CREATE A BARRIER TO STATE-ISSUED FRANCHISES.**

19 In its comments in response to the OIR, SWT raised the concern that the method for
20 collecting the \$1 million of user fees in Year One of state-issued franchises could create a
21 significant disincentive to smaller video providers to obtain state-issued franchises during Year
22 One. The PD embraces SWT's concerns on this issue and modifies the manner in which the
23 Commission would collect Year One user fees. The PD would now rely on households within a
24 designated franchise area to allocate Year One user fees. SWT appreciates the movement on this
25 issue reflected in the PD.

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28 ² See Draft General Order, Rule VI.B.1.

1 SWT remains concerned, however, that there is sufficient uncertainty stemming from the
2 allocation of Year One user fees that SWT may still not be able to justify applying for a state-
3 issued franchise in Year One. For example, if companies such as AT&T and Verizon elect to
4 forego or delay state-issued franchises in Year One, the bulk of the \$1 million start-up costs to be
5 collected in Year One would be allocated to SWT if it was one of the only filers for a state
6 franchise. Simply put, SWT's video operations are not large enough to bear such significant costs.
7 The uncertainty surrounding allocation of user fees will delay competitive entry of smaller
8 companies, like SureWest, because they would necessarily have to wait for larger providers to
9 obtain state franchises and thereby more equitably share in the allocation of user fees before
10 applying for their own state franchises.

11 Uncertainty regarding user fees should not play a role in a provider's decision whether to
12 apply for a state-issued franchise. To give providers a better idea of what exposure they might
13 expect, SWT recommends that the Commission adopt a cap on potential user fees assessed to any
14 one provider during any year. Along these lines, the Commission should cap user fees paid by a
15 single franchise holder to one percent of that franchise holder's revenues in any year. Any
16 shortfall in collection of Year One user fees resulting from a cap could be made up in subsequent
17 years as the number of households and revenues generated from state franchises grow.

18 19 **IV. THE COMMISSION SHOULD MODIFY THE DEFINITION OF "TELEPHONE** 20 **SERVICE AREA."**

21 The PD rejects SWT's proposal to modify the definition of "Telephone Service Area."
22 Under the current definition, SWT would have to provide census tract information regarding the
23 number of households in every part of the state covered by its CLEC CPCN. SWT's CPCN
24 authorizes it to provide service throughout ninety-nine percent (99%) of the state, including Los
25 Angeles, San Diego, San Francisco, San Jose, Fresno, Bakersfield, Palm Springs, etc. However,
26 SWT only provides telephone service in the greater Sacramento metropolitan area. Why should
27 SWT have to acquire and provide such census tract information for virtually the entire State of
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1 California when it does not provide or expects to ever provide service in those other places? To
2 adopt a reasonable reporting requirement as intended by DIVCA, the Commission should define
3 "Telephone Service Area" as the area where a holder is currently providing telephone service.

4 Limiting the definition in this manner will provide the necessary information on that
5 provider's service area and will not hinder the Commission's efforts to monitor build-out
6 requirements, but will reduce the burden on small carriers to procure census tract information for
7 areas that have no relevance to them. The legislative intent behind the reporting requirements in
8 DIVCA was for the state franchise provider to furnish information on where it operates.
9 Requiring the collection and reporting of census information for virtually the entire state by
10 companies which only operate in less than one percent of the state seems at odds with the intent of
11 DIVCA. SWT respectfully requests that the Commission reconsider the definition of "Telephone
12 Service Area."

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14 **V. THE COMMISSION SHOULD NOT TRY TO SPECIFY BUILD-OUT**
15 **REQUIREMENTS FOR SMALL PROVIDERS.**

16 The PD raises an inconsistency in the language of DIVCA compared to the understanding
17 of stakeholders during the development of the legislation. Section 5890(c) was written to provide
18 a reduced level of oversight for video system build-out within the service areas of incumbent local
19 exchange carriers with fewer than one million telephone customers ("Small Video Service
20 Providers"). In contrast, the specific requirements in 5890(b) and (e) were meant to apply to the
21 large incumbent local exchange carriers. Regrettably, none of these subsections include the
22 intended limitation that they apply to incumbent local exchange carriers only. The legislature
23 intended some oversight so that Small Video Service Providers which acquire a state franchise for
24 their incumbent local exchange area would not just build in areas with affluent customers. The
25 fact that Section 5890(b), (c), and (e) were intended to apply only to incumbent local exchange
26 carrier service areas is reflected in Section 5890(d), which covers any entity (e.g. incumbent local
27 exchange carrier, cable company, competitive overbuilders, etc.) that builds new facilities outside

1 of where it currently provides telephone service. These are most notably known as the
2 competitive overbuilders that overlaid their own facilities in an area to compete with the
3 incumbent cable provider. In Section 5890(d), the legislation was attempting to encourage such
4 small overbuilders by creating a rebuttable presumption that discrimination in providing service
5 has not occurred within those areas. SureWest intends to address these ambiguities in the context
6 of clean-up legislation to be considered during the current legislative session.

7 On a related topic, the PD contemplates that the Commission may intend to adopt specific
8 build-out requirements for video service providers that have fewer than one million telephone
9 customers.³ SWT contends that applying generic build-out requirements to small video service
10 providers is contrary to legislative intent reflected in Section 5890(c). Pursuant to that section,
11 build-out within a telephone service area must occur "within a reasonable time." The statute gives
12 the Commission the responsibility and flexibility to decide what constitutes a reasonable time.
13 SWT believes that providers should have the option to demonstrate what qualifies as a "reasonable
14 time" on a case-by-case basis, not pursuant to generic rules. Clearly, if a smaller provider can
15 meet the requirements of Sections 5890(b) or 5890(e) (which have been developed for the large
16 companies), they should meet the "reasonable time" requirement under Section 5890(c).

17 The legislative framework supports SWT's interpretation of this build-out requirement.
18 For larger providers, the legislature identified specific benchmarks to apply. Had the legislature
19 intended similar benchmarks to apply to smaller providers, it would have adopted such standards.
20 SWT participated extensively in the legislative process and advocated specifically against
21 applying set build-out requirements to smaller providers. In promulgating Section 5890(c), the
22 legislature recognized that smaller providers have unique circumstances and issues that must be
23 viewed on a case-by-case basis in the provision of cable service within their incumbent local
24 exchange carrier service area. The legislature understood this and, instead, included language that
25 allowed the Commission to review such reasonable time issues as they arise. Moreover, in
26 adopting separate statutory language for smaller providers, the Legislature signaled its intent that

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28 ³ PD, pp. 153-155; *see also* Proposed General Order, Section III.B.

1 smaller provider should be subject to less stringent build-out standards than the larger companies,
2 consistent with the specifics of each company's service territory and business model. SWT's
3 advocacy resulted in Sections 5890(c) and (d) being drafted to avoid specific standards for small
4 providers. Consistent with this result, the Commission should also allow small providers to
5 address the reasonableness of their proposed build-out on a case-specific basis.

6 SWT is also concerned that the new General Order would require a small provider to give
7 the Commission three months advance notice prior to filing an application for a franchise in order
8 for the Commission to open a proceeding to determine specific build-out requirements. Given that
9 the application process is only intended to last 44 days, this provision, at a minimum, triples the
10 time it will take for small providers to acquire state franchises. Such an outcome is clearly
11 contrary to the streamlined franchising contemplated by DIVCA and should not be adopted. As
12 discussed above, instead of trying to craft specific build-out requirements for small providers in
13 this three month period, the Commission should handle small providers' build-out compliance on
14 a case-by-case basis to the extent that issues arise, and based on the reasonableness standard
15 outlined in DIVCA.

16 If, notwithstanding the problems outlined above, a provider wishes to seek some form of
17 advance "reasonableness" analysis of the build-out plans of smaller providers, that analysis should
18 take place through a much more streamlined and expedited process than the application procedure
19 outlined in the PD. SureWest is skeptical that an application process could be completed within
20 the 90-day timeframe contemplated by the PD, given all of the administrative procedures that
21 surround the application process. In addition, the Commission could establish a set of less
22 stringent "safe harbor" standards for smaller providers in Phase II of this rulemaking, by which
23 smaller providers could demonstrate compliance with the "reasonableness" requirement by
24 meeting a less aggressive build-out standard than what applies to AT&T and Verizon. Even if this
25 type of procedure is pursued, however, carriers should have the option to "opt out" of such a
26 mechanism by producing facts specific to their service territories and circumstances that would
27 justify individualized treatment under the "reasonableness" standard.

1 **VI. SECTION III.C.4 OF THE GENERAL ORDER MUST RECONCILE**
2 **CONFLICTING STATUTORY PROVISIONS.**

3 As suggested in SWT's redline accompanying its opening comments in response to the
4 OIR, Section III.C.4 of the proposed general order now tracks the statutory language of Section
5 5930(c). Section 5930(c) requires that a superseding state franchise cover the mandated service
6 area in the superseded local franchise. However, Section 5840(p) provides an exception for small
7 providers, i.e., providers with less than 1,000,000 telephone customers. Under Section 5840(p),
8 the superseding state franchise for small providers providing video service in competition with
9 another incumbent cable operator need only cover the area that the provider is actually serving as
10 of January 1, 2007. Accordingly, Section III.C.4 should be updated to reflect the exception
11 outlined in Section 5840(p).

12
13 **VII. CONCLUSION.**

14 SWT appreciates the hard work represented by the PD and the proposed general order.
15 With the minor corrections identified in these comments, the PD should be approved by the
16 Commission at its earliest opportunity.

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18 Dated this 5th day of February, 2007, at San Francisco, California.

19 E. Garth Black
20 Mark P. Schreiber
21 Sean P. Beatty
22 Patrick M. Rosvall
23 COOPER, WHITE & COOPER LLP
24 201 California Street, 17th Floor
25 San Francisco, CA 94111
26 Telephone: (415) 433-1900
27 Facsimile: (415) 433-5530

28 By: 

Sean P. Beatty

Attorneys for SureWest TeleVideo

1 CERTIFICATE OF SERVICE BY MAIL

2

3 I, Noel Gielegthem, declare:

4 I am a resident of the State of California, over the age of eighteen years, and not a party to the

5 within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street,

6 17th Floor, San Francisco, CA 94111.

7 On February 5, 2007, I served the following OPENING COMMENTS OF SUREWEST

8 TELEVIDEO (U 6324 C) ON PROPOSED DECISION MAILED JANUARY 16, 2007 by placing a

9 true and correct copy thereof with the firm's mailing room personnel, for mailing in accordance with

10 the firm's ordinary practices, addressed to the parties on the CPUC service list for Proceeding No. R.

11 06-10-005.

12 Copies were also hand delivered to Assigned ALJ Sullivan and Assigned Commissioner

13 Chong.

14 Copies were also served via e-mail on those parties on the service list who provided an e-mail

15 address.

16 I declare under penalty of perjury that the foregoing is true and correct.

17 Executed on February 5, 2007, at San Francisco, California.

18

19 
Noel Gielegthem

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23

24

25

26

27

28

SERVICE LIST

CPUC Service List as of January 16, 2007 Proceeding No. R. 06-10-005

ALLEN S. HAMMOND, IV
PROFESSOR OF LAW
SANTA CLARA UNIVERSITY
SCHOOL OF LAW
500 EL CAMINO REAL
SANTA CLARA, CA 94305

ALO A STEVENS, DIRECTOR,
GOVERNMENT&EXTERNAL AFFAIRS
FRONTIER COMMUNICATIONS
PO BOX 708970
SANDY, UT 84070-8970

BARRY FRASER, CABLE FRANCHISE
ADMINISTRATOR
COUNTY OF SAN DIEGO
1600 PACIFIC HIGHWAY, ROOM 208
SAN DIEGO, CA 92101

BILL NUSBAUM
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

RICHARD CHABRAN
CALIFORNIA COMMUNITY TECHNOLOGY
POLICY
1000 ALAMEDA STREET, SUITE 240
LOS ANGELES, CA 90012

CHRISTINE MAILLOUX, ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

DELANEY HUNTER
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

APRIL MULQUEEN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ANNE NEVILLE
CALIF PUBLIC UTILITIES COMMISSION
CARRIER BRANCH
AREA 3-E
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM HUGHES
ASSISTANT CITY ATTORNEY
CITY OF SAN JOSE
16TH FLOOR
200 EAST SANTA CLARA STREET
SAN JOSE, CA 95113-1900

BOB WILSON
300 N. FLOWER STREET, 813
SANTA ANA, CA 92703-5000

GERALD R. MILLER
CITY OF LONG BEACH
333 WEST OCEAN BLVD.
LONG BEACH, CA 90802

DAVID HANKIN, VP, GOVERNMENT AFFAIRS
RCN CORPORATION
1400 FASHION ISLAND BLVD., SUITE 100
SAN MATEO, CA 94404

DOUGLAS GARRETT
COX COMMUNICATIONS
2200 POWELL STREET, STE. 1035
EMERYVILLE, CA 94608

ANN JOHNSON
VERIZON
HQE02F61
600 HIDDEN RIDGE
IRVING, TX 75038

ALIK LEE
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS & CONSUMER
ISSUES BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BARRY F. MCCARTHY, ESQ.
ATTORNEY AT LAW
MCCARTHY & BARRY LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

CHARLES BORN, MANAGER
GOVERNMENT & EXTERNAL AFFAIRS
FRONTIER COMMUNICATIONS
OF CALIFORNIA
9260 E. STOCKTON BLVD.
ELK GROVE, CA 95624

CYNTHIA J. KURTZ, CITY MANAGER
CITY OF PASADENA
117 E. COLORADO BLVD., 6TH FLOOR
PASADENA, CA 91105

DAVID J. MILLER, ATTORNEY AT LAW
AT&T CALIFORNIA
ROOM 2018
525 MARKET STREET
SAN FRANCISCO, CA 94105

DAVID C. RODRIGUEZ
STRATEGIC COUNSEL
523 WEST SIXTH STREET, SUITE 1128
LOS ANGELES, CA 90014

EDWARD RANDOLPH, CHIEF CONSULTANT
ASSEMBLY COMMITTEE
UTILITIES AND COMMERCE
STATE CAPITOL
SACRAMENTO, CA 95814

ESTHER NORTHRUP
COX CALIFORNIA TELCOM, LLC
5159 FEDERAL BLVD.
SAN DIEGO, CA 92105

GREG R. GIERCZAK, EXECUTIVE DIRECTOR
SUREWEST TELEPHONE
PO BOX 969
200 VERNON STREET
ROSEVILLE, CA 95678

GLENN SEMOW, DIRECTOR STATE
REGULATORY & LEGAL AFFAIR
CALIFORNIA CABLE &
TELECOMMUNICATIONS
360 22ND STREET, NO. 750
OAKLAND, CA 94612

TIM HOLDEN
SIERRA NEVADA COMMUNICATIONS
PO BOX 281
STANDARD, CA 95373

JENNIE CHANDRA
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5141
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JEFFREY LO
ASIAN LAW CAUCUS
939 MARKET STREET, SUITE 201
SAN FRANCISCO, CA 94103

JOSEPH S. FABER, ATTORNEY AT LAW
LAW OFFICE OF JOSEPH S. FABER
3527 MT. DIABLO BLVD., SUITE 287
LAFAYETTE, CA 94549

ELAINE M. DUNCAN, ATTORNEY AT LAW
VERIZON
711 VAN NESS AVENUE, SUITE 300
SAN FRANCISCO, CA 94102

FASSIL FENIKILE
AT&T CALIFORNIA
525 MARKET STREET, ROOM 1925
SAN FRANCISCO, CA 94105

GREG FUENTES
11041 SANTA MONICA BLVD., NO.629
LOS ANGELES, CA 90025

GREG STEPHANICICH
RICHARDS, WATSON & GERSHON
44 MONTGOMERY STREET, SUITE 3800
SAN FRANCISCO, CA 94104-4811

IZETTA C.R. JACKSON
OFFICE OF THE CITY ATTORNEY
CITY OF OAKLAND
1 FRANK H. OGAWA PLAZA, 10TH FLR.
OAKLAND, CA 94103

JOE CHICOINE, MANAGER, STATE
GOVERNMENT AFFAIRS
FRONTIER COMMUNICATIONS
PO BOX 340
ELK GROVE, CA 95759

JOSE E. GUZMAN, JR.
NOSSAMAN GUTHNER
KNOX & ELLIOTT LLP
50 CALIFORNIA STREET, 34TH FLOOR
SAN FRANCISCO, CA 94111-4799

KATIE NELSON
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533

ENRIQUE GALLARDO
LATINO ISSUES FORUM
160 PINE STREET, SUITE 700
SAN FRANCISCO, CA 94111

MICHAEL J. FRIEDMAN, VICE PRESIDENT
TELECOMMUNICATIONS
MANAGEMENT CORP.
5757 WILSHIRE BLVD., SUITE 645
LOS ANGELES, CA 90036

GRANT KOLLING
SENIOR ASSISTANT CITY ATTORNEY
CITY OF PALO ALTO
250 HAMILTON AVENUE, 8TH FLOOR
PALO ALTO, CA 94301

GRANT GUERRA
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 7442
SAN FRANCISCO, CA 94120-7442

MARGARET L. TOBIAS
TOBIAS LAW OFFICE
460 PENNSYLVANIA AVENUE
SAN FRANCISCO, CA 94107

JOSEPH WANZALA
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS &
CONSUMER ISSUES BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JEFFREY SINSHEIMER
CALIFORNIA CABLE &
TELECOMMUNICATIONS
360 22ND STREET, 750
OAKLAND, CA 94612

KELLY E. BOYD
NOSSAMAN, GUTHNER, KNOX AND ELLIOTT
915 L STREET, SUITE 1000
SACRAMENTO, CA 95814

KEN SIMMONS
ACTING GENERAL MANAGER
INFORMATION TECHNOLOGY AGENCY
CITY HALL EAST, ROOM 1400
200 N. MAIN STREET
LOS ANGELES, CA 90012

KEVIN SAVILLE
ASSOCIATE GENERAL COUNSEL
CITIZENS/Frontier COMMUNICATIONS
2378 WILSHIRE BLVD.
MOUND, MN 55364

ALEXIS K. WODTKE, ATTORNEY AT LAW
CONSUMER FEDERATION OF CALIFORNIA
(CFC)
520 S. EL CAMINO REAL, STE. 340
SAN MATEO, CA 94941

MALCOLM YEUNG, STAFF ATTORNEY
ASIAN LAW CAUCUS
939 MARKET ST., SUITE 201
SAN FRANCISCO, CA 94103

MICHAEL OCHOA
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS &
CONSUMER ISSUES BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PETER A. CASCIATO
A PROFESSIONAL CORPORATION
355 BRYANT STREET, SUITE 410
SAN FRANCISCO, CA 94107

PATRICK WHITNELL
LEAGUE OF CALIFORNIA CITIES
1400 K STREET
SACRAMENTO, CA 95814

KIMBERLY M. KIRBY
ATTORNEY AT LAW
MEDIASPORTSCOM P.C.
3 PARK PLAZA, SUITE 1650
IRVINE, CA 92614

ROBERT LEHMAN
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS &
CONSUMER ISSUES BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LESLA LEHTONEN, VP LEGAL &
REGULATORY AFFAIRS
CALIFORNIA CABLE
TELEVISION ASSOCIATION
360 22ND STREET, NO. 750
OAKLAND, CA 94612

MARK T. BOEHME
ASSISTANT CITY ATTORNEY
CITY OF CONCORD
1950 PARKSIDE DRIVE
CONCORD, CA 94510

MARIE C. MALLIETT
THE COMMUNICATIONS WORKERS
OF AMERICA
2870 GATEWAY OAKS DRIVE, SUITE 100
SACRAMENTO, CA 95833-3509

PETER DRAGOVICH
ASSISTANT TO THE CITY MANAGER
CITY OF CONCORD
1950 PARKSIDE DRIVE, MS 01/A
CONCORD, CA 94519

RANDY CHINN
SENATE ENERGY UTILITIES &
COMMUNICATIONS
STATE CAPITOL, ROOM 4040
SACRAMENTO, CA 95814

JONATHAN L. KRAMER
ATTORNEY AT LAW
KRAMER TELECOM LAW FIRM
2001 S. BARRINGTON AVE., SUITE 306
LOS ANGELES, CA 90025

LONNIE ELDRIDGE
DEPUTY CITY ATTORNEY
CITY ATTORNEY'S OFFICE
CITY HALL EAST, SUITE 700
200 N. MAIN STREET
LOS ANGELES, CA 90012

MAGGLE HEALY
CITY OF REDONDO BEACH
415 DIAMOND STREET
REDONDO BEACH, CA 90277

MARK RUTLEDGE
TELECOMMUNICATIONS FELLOW
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLR.
BERKELEY, CA 94704

MARIA POLITZER
LEGAL DEPARTMENT ASSOCIATE
CALIFORNIA CABLE
TELEVISION ASSOCIATION
360 22ND STREET, NO. 750
OAKLAND, CA 94612

PHILIP KAMLARZ
CITY OF BERKELEY
2180 MILVIA STREET
BERKELEY, CA 94704

REGINA COSTA
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

RANDLOPH W. DEUTSCH
SIDLEY AUSTIN LLP
555 CALIFORNIA STREET, SUITE 2000
SAN FRANCISCO, CA 94104

ROBERT GNAIZDA
POLICY DIRECTOR/GENERAL COUNSEL
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLOOR
BERKELEY, CA 94704

ROY MORALES
CHIEF LEGISLATIVE ANALYST
CIYT OF LOS ANGELES
CITY HALL
200 N. SPRING STREET, 2ND FLOOR
LOS ANGELES, CA 90012

ROBERT A. RYAN, COUNTY COUNSEL
COUNTY OF SACRAMENTO
700 H STREET, SUITE 2650
SACRAMENTO, CA 95814

SINDY J. YUN
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVEN LASTOMIRSKY
DEPUTY CITY ATTORNEY
CITY OF SAN DIEGO
1200 THIRD AVENUE, 11TH FLOOR
SAN DIEGO, CA 92101

SCOTT MCKOWN
C/O CONT OF MARIN ISTD
MARIN TELECOMMUNICATION AGENCY
371 BEL MARIN KEYS BOULEVARD
NOVATO, CA 94941

STACY BURNETTE, ACTING CABLE
TELEVISION DIV. MANAGER
INFORMATION TECHNOLOGY AGENCY
CITY HALL EAST, ROOM 1255
200 N. MAIN STREET
LOS ANGELES, CA 90012

SUE BUSKE
THE BUSKE GROUP
3001 J STREET, SUITE 201
SACRAMENTO, CA 95816

SUSAN WILSON, DEPUTY CITY ATTORNEY
RIVERSIDE CITY ATTORNEY'S OFFICE
3900 MAIN STREET, 5TH FLOOR
RIVERSIDE, CA 92522

SYREETA GIBBS
AT&T CALIFORNIA
525 MARKET STREET, 19TH FLOOR
SAN FRANCISCO, CA 94105

THALIA N.C. GONZALEZ, LEGAL COUNSEL
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVE., 2ND FLOOR
BERKELEY, CA 94704

TRACEY L. HAUSE
ADMINISTRATIVE SERVICES DIRECTOR
CITY OF ARCADIA
240 W. HUNTINGTON DRIVE
ARCADIA, CA 91007

TOM SELHORST
AT&T CALIFORNIA
525 MARKET STREET, 2023
SAN FRANCISCO, CA 94105

TIMOTHY J. SULLIVAN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5204
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM JOHNSTON
CALIF PUBLIC UTILITIES COMMISSION
TELECOMMUNICATIONS &
CONSUMER ISSUES BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

WILLIAM IMPERIAL
TELECOMMUNICATIONS REG. OFFICER
INFORMATION TECHNOLOGY AGENCY
CITY HALL EAST, ROOM 1255
200 N. MAIN STREET
LOS ANGELES, CA 90012

WILLIAM K. SANDERS
DEPUTY CITY ATTORNEY
OFFICE OF THE CITY ATTORNEY
1 DR. CARLTON B. GOODLETT PLACE
ROOM 234
SAN FRANCISCO, CA 94102-4682

WILLIAM H. WEBER, ATTORNEY AT LAW
CBeyond COMMUNICATIONS
320 INTERSTATE NORTH PARKWAY
ATLANTA, GA 30339

WILLIAM L. LOWERY
MILLER VAN EATON, LLP
400 MONTGOMERY STREET, SUITE 501
SAN FRANCISCO, CA 94121

WILLIAM L. LOWERY
MILLER VAN EATON, LLP
400 MONTGOMERY STREET, SUITE 501
SAN FRANCISCO, CA 94121

ROB WISHNER
CITY OF WALNUT
21201 LA PUENTE ROAD
WALNUT, CA 91789

AARON C. HARP
OFFICE OF THE CITY ATTORNEY
CITY OF NEWPORT BEACH
3300 NEWPORT BLVD
NEWPORT BEACH, CA 92658-8915